UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

DAVID STAVISKI d/b/a CHEMUNG VALLEY ACOUSTICAL

And

CLAUDE J. BAILEY, JR., An Individual — Case 3-CA-24227

And

JOHN T. ERVAY, An Individual — Case 3-CA-24231

Lillian Kleingardner, Esq.,
Of Buffalo, New York
For the General Counsel

Joseph J. Steflik, Esq.,
Binghamton, New York
For the Respondent

SUPPLEMENTAL DECISION

Equal Access to Justice Act

WALLACE H. NATIONS, Administrative Law Judge: On November 21, 2003, I issued my decision in the captioned cases dismissing them in their entirety. On January 9, 2004, the National Labor Relations Board (Board) issued its Order adopting my decision and the cases were dismissed. On February 5, 2004, David Staviski d/b/a Chemung Valley Acoustical (Respondent or Applicant) filed an Application for an Award of Fees and Expenses (Application) under the Equal Access to Justice Act (EAJA). On February 12, the Board issued an Order referring the matter to me for disposition. On March 8, Counsel for General Counsel, (General Counsel) filed a Motion seeking to dismiss the Application in its entirety. On March 30, Respondent submitted a Motion to Amend and in Opposition to General Counsels Motion to dismiss. On April 6, General Counsel filed a Motion to Strike Respondent's Motion to Amend the Application.

General Counsel opposes the Application on both jurisdictional and substantive grounds. Specifically, the General Counsel asserts that the Application is defective as it does not establish that Respondent has met the jurisdictional requirements set forth in the Board's Rules and Regulations, as Respondent has failed to provide documentation of its net worth at any relevant time period, and failed to list with specificity the requisite information regarding its workforce. The General Counsel also urges that Respondent's Application be dismissed on substantive grounds, asserting that the General Counsel's position at the hearing was

substantially justified.

A. Did Respondent fail to provide documentation that establishes that it is an eligible employer under EAJA?

The Application is subject to dismissal on the jurisdictional grounds that Respondent failed to establish that it meets the eligibility standards at any relevant time for an award under EAJA as determined by 5 U.S.C. Sec. 504. The sole owner of an unincorporated business claiming an EAJA award has the burden of proving that its net worth did not exceed $7 million and that it employed 500 or fewer employees at the time the action was filed.[1]

Respondent's application fails to establish that Respondent meets the jurisdictional requirements of EAJA on two counts. First, the application contains no exhibits that demonstrate Respondent's net worth. Section 102.147(f) of the Board's Rules and Regulations states that an applicant, except for a qualified tax-exempt organization or cooperative association, must provide with its application a detailed exhibit showing the net worth of the applicant at the time the adversary proceeding was initiated. This provision further states that the exhibits must provide full disclosure of the applicant's assets and liabilities. The only documentation submitted by Respondent in support of the Application is selected portions of Respondent's tax returns for years 1999 through 2002, and an income statement for the years 1000 through 2001. These documents do not constitute a detailed exhibit showing Respondent's net worth, as they do not provide the requisite detail regarding Respondent's assets and liabilities.

Further Respondent has provided no documentation that establishes that it was an eligible employer at any material time. Section 102.143(d) of the Board's Rule and Regulations states that in an unfair labor practice proceeding, eligibility of an applicant shall be determined as of the date the complaint issued. In the instant case, the Consolidated Complaint issued on June 26, 2003. Respondent provided no documentation as to its net worth for any period of time during the year 2003. As Respondent provided no documentation that shows its net worth on or about June 30, 2003, the relevant date, it has not satisfied its burden of establishing that it is an eligible employer under EAJA. Because of this failure to satisfy a jurisdiction requirement as well as other reasons, I will dismiss the application. See Industrial Security Services, 289 NLRB 459 (1988),

The Application is further defective as the Respondent did not comply with Section 102.147 of the Board's Rules and Regulations that state that an applicant shall state the number, category, and work location of employees of the applicant. Respondent provided no such statement in its Application. Rather Respondent merely asserted by its attorney that it employed less than 500 employees. For this further failure to meet its jurisdictional burden, I will recommend dismissal of the Application.

Subsequent to the March 8, 2004 filing by General Counsel of the Motion to Dismiss the Application, Respondent filed what it terms its Motion to Amend and in Opposition to Motion to Dismiss. This filing by Respondent was dated March 30, 2004. Section 102.150 of the Board's Rule and Regulations sets forth the time limits for the filing of an answer and/or motion to dismiss, and any reply thereto in response to an EAJA application. Specifically, Section 102.150 provides that an applicant has 21 days within service of a motion to dismiss to file a response

[1] In its application, Respondent identified itself as a New York corporation. Based on evidence adduced at hearing I found it to be a sole proprietorship. This finding comports with the tax returns submitted with the application.

thereto. Section 102.112 defines the date of service as the date the document is deposited in the United States mail. Section 102.112 defines the date of filing as the date when the matter is required to be received by the Board. Section 102.111(b) states that the Board will consider as timely filed any document postmarked no later than the day before the due date.

General Counsel served on all parties a motion to dismiss the instant Application on March 8, 2004. Accordingly, the Applicant herein was required to file its response thereto on or before Monday, March 29, 2004. In order to timely file its response pursuant to Section 102.111(b) of the Board's Rules and Regulations, the Applicant would have had to deposit its papers in the United States Mail on or before March 27, 2004.[2] However, the Motion and the accompanying Verification and Certification of Service are all dated March 30, 2004. Utilizing the definitions of service and filing set forth in the Board's Rules and Regulations, the Applicant served the Motion on March 30, 2004, two days after the deadline for filing its response had expired. Thus, the Applicant's Motion was untimely filed, and the Applicant failed to ask for an extension of time to file the Motion. I will strike the Motion as untimely.

With its Motion to Amend, Respondent filed a one page document purporting to be a statement of net worth as of June 30, 2003. The Board's Rules and Regulations contain no provisions that allow for an applicant to amend an application for an award of attorney's fees and expenses. Rather, Section 102.148 of the Board's Rules and Regulations specifically provides that an application for an award pursuant to EAJA must be filed with the Board within 30 days of the issuance of the decision giving rise to the determination. Section 102.147 of the Board's Rules and Regulations clearly delineates what must be included in any application filed with the Board. Section 102.147(f) states that each applicant must provide, with its application, a detailed exhibit showing the net worth of the applicant when the adversary proceeding was initiated. The Applicant's Motion is a belated attempt to cure its defective Application well after the deadline for filing such application has passed. Respondent had the obligation to submit the information contained in its last Motion at the time the application was filed. For this further reason I will deny the Motion.

B. Was the General Counsel substantially justified in her litigation positions in these cases?

EAJA provides for the award of attorney's fees and expenses to eligible parties who prevail in litigation before administrative agencies, unless the Government can establish that its litigation position was either "substantially justified" or that special circumstances exist which would make such an award unjust. Although the EAJA statute is silent as to the meaning of "substantially justified," the Supreme Court in Pierce v. Underwood,[3] rejected a standard of something more than simple reasonableness:

"The statutory phrase "substantially justified" means justified in substance or in the main – that is, justified to a degree that could satisfy a reasonable person. This interpretation of the phrase . . . is equivalent to the 'reasonable basis in law and fact' formulation adopted by the vast majority of Courts of Appeal."

The Board has utilized a case by case approach in analyzing EAJA cases. It has interpreted the reasonableness standard in such a way as to not interfere with the vigorous

[2] March 28, 2004 was a Sunday.
[3] 487 U.S. 552 (1988).

enforcement of the labor laws. Where there have been close questions of law and fact, no awards have been made. In cases where conflicting inferences can be drawn from the evidence, the General Counsel is entitled to resolve the conflict in favor of the violations alleged. The General Counsel's failure to prevail raises no presumption that she was not substantially justified in asserting her position. Where credibility issues crucial to the outcome of the case cannot be resolved administratively on the basis of documentary or other objective evidence, the General Counsel is substantially justified in taking the case to trial before and administrative law judge. Bouley, Inc., 308 NLRB 653, 654 (1992); Advance Development Corp., 277 NLRB 1086, 1087 (1985).

The Consolidated Complaint in these cases alleged that Respondent terminated Claude Bailey and John Ervay because they engaged in union and protected, concerted activity. In my Decision, I found that Bailey and Ervay had not been discharged. Rather, based on the evidence I credited, I found that Respondent believed that they had voluntarily resigned their positions to go to work for the Union. I also found that if Respondent had terminated Bailey, it did so because of derogatory remarks made by him that were subsequently relayed to Respondent by other individuals.

As I noted in my decision, this case turned almost entirely on credibility. If one believed Respondent's witnesses, Respondent prevailed and if one believed the General Counsel's witnesses, General Counsel prevailed. Thus, based on the evidence adduced at trial General Counsel was substantially justified in trying this consolidated case. The Region was also substantially justified in bring the case to trial. As noted in General Counsel's brief and the attachments to the brief, upon completion of the investigation of the underlying charges, General Counsel possessed, inter alia, an affidavit from Claude Bailey that established that Bailey and Ervay spoke to Mick Pavlick, an organizer for Carpenters Local 281 (Union); that Robert Tompkins, Respondent's foreman, knew that Bailey and Ervay had spoken to Pavlick; and that Bailey and Ervay had joined the Union the following day. Bailey's affidavit further stated that two days after joining the Union, Bailey received a telephone call from his mother, Deb Bailey, advising him that Robert Tompkins told her that they were both (Bailey and Ervay) out of a job. In his affidavit Bailey testified that he telephoned David Staviski, Respondent's owner, to verify if this was true. According to Bailey, Staviski told him during this conversation, "I heard you're talking some stuff regarding the Union." According to Bailey, Staviski swore at him during this conversation, wished him luck, and hung up.

General Counsel also possessed evidence that corroborated Bailey's affidavit. Specifically, General Counsel had an affidavit from Deb Bailey that verified that Tompkins told her that Bailey was fired because they (Bailey and Ervay) were seen talking about Staviski and "bad mouthing" both Staviski and Tompkins. Deb Bailey further stated in her affidavit that she called Bailey and told him that he was fired, and that Bailey called her back and told her that Staviski had verified that Bailey was fired because he had been talking about the Union. General Counsel also had affidavits from Pavlick and Ervay that verified that Bailey and Ervay had joined the Union, and that Bailey had relayed to Ervay that they were fired because of their interest in the Union. This was the evidence available to General Counsel at the time complaint issued in these cases.

Thus, based on the investigation, the General Counsel had evidence that Bailey and Ervay were engaged in union activity when they talked to Pavlick about joining the Union, and when they joined the Union. The investigation also demonstrated that Bailey and Ervay were engaged in protected, concerted activity when they complained to Matthew Lehmann and Edward Vargo (friends and competitors of Staviski) about their supervisor's (Tompkins) drinking and about having to pick up their paychecks in a bar. The investigation also established that

Respondent was aware that Bailey and Ervay had engaged in union and protected, concerted activity. Knowledge was established by Bailey's testimony that Staviski told him that he had heard that he had been talking about the Union, and by Deb Bailey's testimony that Tompkins told her that Bailey was fired because he had been talking about him and Staviski.

Finally, General Counsel had evidence that Bailey's and Ervay's terminations were motivated by anti-union animus, based on Bailey's testimony in his affidavit that Staviski had said he hear Bailey had been talking about the Union, swore at him, wished him luck and hung up. The General Counsel also had evidence, based on the testimony of Deb Bailey, that the discharges were motivated by Bailey's and Ervay's protected, concerted activity.

In deciding to issue complaint, the General Counsel also considered the timing of the discharges, which came just two or three days after Bailey and Ervay joined the Union, and a day or two after Bailey and Ervay complained about Staviski and Tompkins. Thus, General Counsel had both direct and indirect evidence that Respondent harbored animus toward Bailey and Ervay because they engaged in Union and protected, concerted activity.

Clearly, the General Counsel was substantially justified in litigating the instant cases. I stated in my decision that if I credited General Counsel's witnesses, then Bailey was terminated and the principles of Wright Line, a Division of Wright Line, Inc., 251 NLRB 1083 (1980) would apply. I further stated that if Bailey were terminated, then "the timing of such action clearly supports a finding of discriminatory motivation, coming three days after the first Union activity by Bailey or within hours of Staviski learning of such activity." Had I credited General Counsel's witnesses, the General Counsel would have presented a prima facie case that Bailey was terminated and that union animus contributed to Respondent's decision to terminate him.

Respondent argues that General Counsel's position was not substantially justified because she declined to interview or take affidavits from Lehmann and Vargo, the only non-party witnesses. I cannot agree with this position. In my Decision, I found that Staviski believed that Bailey and Ervay had resigned their employment to work for the Union without informing him of their resignations, based on evidence relayed to Staviski by Lehmann and Vargo. But the only witness who could competently testify as to what Staviski believed was Staviski himself. The testimony of Vargo and Lehmann by itself does not establish that Ervay and Bailey resigned rather than being fired.[4] The testimony of Staviski and Tompkins was crucial to that determination. I again find that General Counsel was substantially justified in taking this case to trial.

The General Counsel also notes that Respondent never asserted prior to trial that its defense was that Bailey and Ervay voluntarily resigned and were not fired. Neither Staviski nor Tompkins provided affidavits or position statements during the investigation despite requests to do so from General Counsel. Its answer to the Consolidated Complaint did not contain an affirmative defense alleging that Ervay and Bailey voluntarily resigned. Absent the testimony of Staviski and Tompkins, there is no way the General Counsel could assess the quality of her evidence and a trial was necessary.

The Board routinely scrutinizes a respondent's cooperation, or lack thereof, during the investigation in order to determine whether the General Counsel was justified in issuing and litigating the complaint. See C. I. Whitten Transfer Co., 312 NLRB 28, 29 (1993)(where the

[4] General Counsel also notes that Lehmann's testimony at trial varied from statements he had made to General Counsel prior to trial, calling into question his credibility.

administrative law judge denied the respondent's application under EAJA because it did not provide witnesses during the investigation or make its records available to the investigator. "Respondent cannot now rely on its own lack of cooperation to support its application for attorney's fees pursuant to Equal Access to Justice Act.")[5] I cannot find that Respondent's lack of cooperation during the investigation in any way supports its Application.

In conclusion, I find that Applicant's Motion to Amend was untimely under the Board's Rules and Regulations and is stricken and/or denied. I further find that Applicant has failed to meet the jurisdictional requirements for EAJA and General Counsel's position was substantially justified throughout the instant unfair labor practice proceeding. Accordingly, I grant General Counsel's Motion To Dismiss the instant application for an EAJA award. On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

The General Counsel's Motion to Dismiss the Application for an award of attorney's fees and expenses under EAJA of David Staviski d/b/a Chemung Valley Acoustical is granted and the Application is dismissed in its entirety.

Dated, Washington, D.C.

Wallace H. Nations
Administrative Law Judge

[5] See also Glesby Wholesale, Inc., 340 NLRB No. 128 (November 28, 2003); Leeward Auto Wreckers, Inc., 283 NLRB 574 (1987).

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.